[Cite as *State v. Parks*, 2009-Ohio-7001.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Respondent-Appellee,	:	**CASE NO. 2008-T-0119**
- vs -	:	
JAMES M. PARKS,	:	
Petitioner-Appellant.	:	

Appeal from the Court of Common Pleas, Case No. 2008 CV 901.

Judgment: Reversed and remanded.

Dennis Watkins, Trumbull County Prosecutor, and *Deena L. DeVico*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Respondent-Appellee).

James M. Parks, pro se, PID: 463-038, Trumbull Correctional Institution, P.O. Box 901, Leavittsburg, OH 44430-0901 (Petitioner-Appellant).

TIMOTHY P. CANNON, J.

{¶1} James M. Parks appeals from the trial court's entry of summary judgment in favor of the state, finding that he was properly classified as a Tier III Sex Offender, as well as its finding that the new Sexual Offender Registration and Notification Act (SORN or "the Act"), R.C. Chapter 2950 (also known as Senate Bill 10, Ohio's version of the Adam Walsh Act or "AWA"), is constitutional.

{¶2} In 2003, Parks was indicted for six counts of rape in Carroll County, Ohio. On February 9, 2004, he pleaded guilty to each count. By a judgment entry filed March 4, 2004, the Carroll County Court of Common Pleas sentenced Parks to life in prison on each count, with parole eligibility after ten years. Three terms were to be served concurrently, with the other three terms also to be served concurrently, but consecutive to the first three. While Parks was also classified under Ohio's sex offender laws, the classification received is not evident from the record.

{¶3} Parks received a letter from the Ohio Attorney General in February 2008 notifying him that he was being reclassified as a Tier III sex offender under AWA. In response to this letter, Parks filed a timely petition in the trial court to contest the classification and an application for a hearing. Thereafter, he filed a motion for summary judgment. Parks also filed a motion for appointment of counsel, which was denied by the trial court.

{¶4} Through these filings Parks raised numerous arguments. Parks argues that the Department of Rehabilitation and Correction ("DRC") "lost jurisdiction" after December 1, 2007, to serve written notice of the new registration and classification duties. Therefore, because Parks was served with notice on February 14, 2008, he claims he is not subject to the Act.

{¶5} The state of Ohio filed a motion for summary judgment in May 2008 in response to Parks' petition. In addition, the state of Ohio filed a response to Parks' request to dismiss or request for a stay. The trial court granted the state's motion for summary judgment and denied all of Parks' pending motions, including his request for an oral hearing.

{¶6} Parks filed a timely notice of appeal, assigning the following four errors:

{¶7} "[1.] The trial court erred by not granting Petitioner's Motion for Summary Judgment because the Department of Rehabilitation and Correction lost jurisdiction to distribute to adult prison inmates the Notice of New Classification and Registration Duties after December 1, 2007.

{¶8} "[2.] The trial court erred by not granting a hearing pursuant to R.C. 2950.032(E).

{¶9} "[3.] The trial court erred when it denied the appointment of counsel because the Petitioner filed timely requests for counsel under the Adam Walsh Act.

{¶10} "[4.] The Adam Walsh Act (AWA) amendments to R.C. §2950.01 et seq., do not apply to the Defendant because he was sentenced in 2004 and the current application of the AWA violates, Clause I, Section 10, Article I, of the United States Constitution as ex post facto legislation, and violates Section 28, Article II, of the Ohio Constitution as retroactive legislation, and further violates R.C. §§1.48 and 1.58, et. seq."

{¶11} Under his first assignment of error, Parks asserts the DRC lacked jurisdiction to serve his "Notice of New Classification and Registration Duties" after December 1, 2007. Parks, in his motion for summary judgment, included an affidavit asserting that he did not receive this notice until February 14, 2008.

{¶12} R.C. 2950.03(A)(1), governing the notice to an offender of the duty to register, provides, in relevant part:

{¶13} "Regardless of when the person committed the sexually oriented offense ***, if the person is an offender who is sentenced to a prison term, a term of

imprisonment, or any other type of confinement for any offense, and *if on or after January 1, 2008, the offender is serving that term*, *** the official in charge of the jail, workhouse, state correctional institution, or other institution in which the offender serves the prison term, ***, shall provide the notice to the offender *before the offender is released* ***." (Emphasis added.)

{¶14} Pursuant to R.C. 2950.032, "[a]ttorney general to determine tier classification for each offender or delinquent child; notice of provisions implemented on January 1, 2008," the Attorney General was required to provide written notice between July 1, 2007, and December 1, 2007, to all such offenders, *except* that "[t]he department *** [is] *not required to provide the written notice to an offender *** if the attorney general included in the document provided to the particular department *** notice that the attorney general will be sending that offender *** a registered letter and that the department is not required to provide to that offender *** the written notice*." R.C. 2950.032(A)(2). (Emphasis added.)

{¶15} With respect to this issue, this court stated in *State v. Dehler*, 11th Dist. No. 2008-T-0061, 2009-Ohio-5059:

{¶16} "While the statutory language is a tad convoluted, Mr. Dehler's argument that the provision of the new Act cannot apply to him because he received his notice after December 1, 2007, must fail because he remains incarcerated. None of his rights have been abused. His classification under either the old sex offender registration framework or the newly enacted one arose by operation of law, and the failure to classify Mr. Dehler and notify him of his classification and registration duties would be a failure only if it occurred after his release.

{¶17} "Mr. Dehler's 'Notice of New Classification and Registration Duties' is a part of our record. He received the notice on January 7, 2008. The notice was dated November 30, 2007, thus it is clear that the Attorney General made the determination that Mr. Dehler was a Tier III offender on that date. The notice was then timely provided, pursuant to R.C. 2950.03(A)(1), which clearly states that regardless of when the sexually oriented offense was committed and if, on or after January 1, 2008, the offender is incarcerated for that offense, notice shall be provided before the offender is released.

{¶18} "This statutory interpretation is further reinforced by a reading of R.C. 2950.033, which applies to offenders whose duties to register are scheduled to terminate on or after July 1, 2007, and prior to January 1, 2008.

{¶19} "R.C. 2950.033(A)(5) states in relevant part:

{¶20} "'If the offender *** is in a category described in division (A)(1)(a) of section R.C. 2950.032 *** but does not receive a notice from the department of rehabilitation and correction *** pursuant to (A)(2) of that section, *notwithstanding the failure of the offender *** to receive the registered letter of the notice, the offender's *** duty to comply with Sections R.C. 2950.04, 2950.041, 2950.05, and 2950.06 shall continue in accordance with, and for the duration specified in, the provisions of Chapter 2950 of the Revised Code as they will exist under the changes to the provisions that will be implemented on January 1, 2008*.' ***

{¶21} "Thus, even those offenders who did not receive notice between July 1, 2007 and December 1, 2007, and whose duties were set to expire during that time

period, are still expected to comply with the new Act. Regardless of whether those offenders received timely notice, their duties have been extended pursuant to the Act.

{¶22} "As Mr. Dehler received his notice on January 7, 2008, and is still incarcerated for the 1992 conviction for rape and gross sexual imposition, we fail to see how he is relieved of the mandatory requirements of the Act. Indeed, even offenders whose duties were set to expire, and who did not receive timely notice, are expected to comply." Id. at ¶41-47. (Emphasis sic.)

{¶23} While Parks maintains he did not receive his notice until February 14, 2008, a review of the record in the instant case reveals Parks' "Notice of New Classification and Registration Duties" was dated November 30, 2007. Therefore, it is evident that the Attorney General classified Parks as a Tier III sex offender on said date.

{¶24} Based on the foregoing, Parks' first assignment of error is without merit.

{¶25} Under Parks' second assignment of error, he contends the trial court erred in not granting a hearing pursuant to R.C. 2950.032(E). We agree.

{¶26} Parks filed a request for a hearing pursuant to R.C. 2950.032(E) to contest his classification as a Tier III offender. This request was filed within 60 days of Parks receiving notice of his classification, thus it was timely. R.C. 2950.032(E).

{¶27} Parks had a right to a hearing pursuant to R.C. 2950.032(E), which provides, in pertinent part:

{¶28} "An offender or delinquent child who is provided a notice under division (A)(2) or (B) of this section may request as a *matter of right* a court hearing to contest the application to the offender or delinquent child of the new registration requirements

under Chapter 2950 of the Revised Code as it will exist under the changes that will be implemented on January 1, 2008." (Emphasis added.)

{¶29} R.C. 2950.032(E) states that the provisions in R.C. 2950.031 apply regarding the conduct of the hearing. R.C. 2950.031(E), provides, in part:

{¶30} "[If a hearing is properly requested, the] court shall schedule a hearing, and shall provide notice to the offender or delinquent child and prosecutor *of the date, time, and place of the hearing*. ***

{¶31} "*** If an offender or delinquent child requests a hearing in accordance with this division, *at the hearing, all parties are entitled to be heard, and the court shall consider all relevant information and testimony* presented relative to the application to the offender or delinquent child of the new registration requirements under Chapter 2950 of the Revised Code as it will exist under the changes that will be implemented on January 1, 2008. ***" (Emphasis added.)

{¶32} The "non-oral hearing" that occurred in this matter did not give Parks an opportunity to be heard or to present testimony.

{¶33} The state of Ohio cites to the following language of R.C. 2950.031(E), which indicates the Rules of Civil Procedure are to apply to these hearings:

{¶34} "In any hearing under this division, the Rules of Civil Procedure *** apply, *except to the extent that those Rules would by their nature be clearly inapplicable*." (Emphasis added.)

{¶35} The state of Ohio uses this language to conclude that non-oral hearings are permitted in summary judgment exercises pursuant to Civ.R. 56; thus, a hearing was not required in this matter. The state of Ohio also maintains that Civ.R. 7(B)(2) and

Loc.R. 9.06 of the Trumbull County Court of Common Pleas permit certain motions to be decided without an oral hearing.

{¶36} Rules of civil procedure (or local rules) that are in direct conflict to the mandate of the statute to conduct a hearing are "by their nature *** clearly inapplicable." See R.C. 2950.031(E). Moreover, pursuant to the language of the statute, the Rules of Civil Procedure apply *at the hearing*. The legislature did not intend for a court to use a rule of civil procedure or a local rule to supersede its unambiguous directive that a hearing occur.

{¶37} The requirement of having a hearing appears, on its face, to be somewhat nonsensical. The limited issues the trial court is permitted to consider appear to be capable of resolution by simple administrative review. However, by mandating a hearing, it appears the legislature has attempted to provide a procedural safeguard to an otherwise suspect due process picture. Whatever the reason, the legislature did not suggest a hearing, nor did it make the hearing an option. The clear language, no matter how empty a right it supports, can only be read to mandate a hearing. As a result, the legislature did not intend for a court to use a rule of civil procedure or a local rule to supersede its unambiguous directive that a hearing occur.

{¶38} The statute calls for a hearing that, pursuant to R.C. 2950.032(E), should occur by video conferencing, if such technology is available, unless the trial court determines that "the interests of justice" require Parks to be physically present. Parks did not receive a hearing, and this matter shall be remanded to the trial court in order for the trial court to provide Parks with his statutory right to a hearing.

{¶39} We further note that although the record indicates Parks was indicted on six counts of rape, pleaded guilty to each count, and was classified under the then-current sex offender law, the record is devoid of Parks' previous classification. Parks' previous classification may be outcome-determinative with respect to his assertion that the application of Ohio's Adam Walsh Act, as applied to him, is unconstitutional. See *State v. Ettenger*, 11th Dist. No. 2008-L-054, 2009-Ohio-3525, at ¶56-59 & 84.

{¶40} Accordingly, Parks' second assignment of error is with merit.

{¶41} Based on the disposition of Parks' second assignment of error, the third and fourth assignments of error are not ripe for review.

{¶42} It is the order and judgment of this court that the judgment of the Trumbull County Court of Common Pleas is hereby reversed, and this matter is remanded for proceedings consistent with this opinion.

CYNTHIA WESTCOTT RICE, J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

{¶43} I would go ahead and reach the merits of Mr. Park's constitutional challenges to his reclassification, embodied in his fourth assignment of error, and reverse based on the reasoning of my dissent in *Ball v. State*, 11th Dist. No. 2008-L-053, 2009-Ohio-4099, at ¶65-99. While applauding the majority's desire to extend the safeguards of oral hearing to persons reclassified under AWA, I nevertheless find the

issue of the *type* of hearing held moot, since any hearing as envisioned by the statute cannot overcome the constitutional infirmities involved. As a consequence, I respectfully dissent.